No. 97-1704 (7)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Petition for Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT FIBREBOARD CORPORATION

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CORPORATE DISCLOSURE

Respondent Fibreboard Corporation is a corporation. Its parent company is Owens Corning. It has no nonwholly owned subsidiaries.

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Fibreboard Corporation submits this opposition to the Petition for Writ of Certiorari filed by Ortiz, *et al.*

PRELIMINARY STATEMENT

The fundamental problem with the petition is that it does not present questions for review "in relation to the circumstances of the case," in the words of Rule 14.1(a) of this Court.

A. The Case Presented By The Petition

According to the petition, this is the case. There was a "mere *possibility* that Fibreboard might *someday* become insolvent" because of asbestos claims. (Petition 9). Fibreboard's insurers, CNA and Pacific, "disputed coverage for Fibreboard's asbestos liabilities," but "their potential exposure was unlimited," and in 1996 the California courts "resolved the bulk of the contested coverage issues in favor of Fibreboard." (Petition 2). In addition, the same day the parties announced the proposed Global Settlement, "the insurers and Fibreboard independently agreed to resolve their insurance coverage dispute with respect to *all* claims." (Petition 3-4). This independent "Trilateral Agreement guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims." (Petition 4).

Petitioners tell the Court that Fibreboard, pursuing its "corporate goal," "solicited several cooperative plaintiffs' lawyers to arrange a Global Settlement of the future asbestos liabilities." (Petition 26). The asbestos claimants possessed "only personal injury damages claims." (Petition 23). The "state law rights" of each member of the class of claimants "are independent of every other's." (Petition 18). The settling parties and the district court "tried to shoehorn these *in personam* damages claims into a Rule 23(b)(1)(B) class," because the possibility of mass opt-outs "would have spoiled the insurers' and Fibreboard's attempts to rid themselves of all future asbestos liability." (Petition 17). They did this through a "limited fund," but it is "limited solely by the negotiating postures of Fibreboard and its insurers." (Petition 18). The Fifth Circuit held the "theoretical risk of future insolvency" made this a "claim for equitable allocation of a self-imposed limited fund." (Petition 9).

This Court, therefore, must take the case to clarify that courts cannot alter substantive rights

> simply by asserting a contrived "limited fund" — a fund limited only by what the defendant, solvent but fearing a future risk of insolvency, is willing to pay now to resolve its entire future stream of tort liabilities.

(Petition 2).

The reader is left wondering how the lower courts erred so badly. They did not. The petition attempts to depict this case as a mass tort defendant simply avoiding a possible insolvency at some time off in the future through a mandatory class action resting solely on a fund limited only by what it and its cooperating insurers are content to pay. In so doing, it badly distorts and ignores the record, as did the dissenting judge below upon whose mischaracterizations the petition so heavily relies. Proper attention to the extensive fact-bound record would show that this case does not deserve review. In the words of one of petitioners' counsel, Mr. Baron, "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again." (Business Insurance, August 5, 1996 at 38).

B. The Case Proven By The Record

According to the record, this is the case. Fibreboard without asbestos liabilities was worth at most $235 million. It claimed that it had two remaining insurance policies, spanning a total of 34 months in 1956-1959. Its asbestos-related liabilities arose from exposures dating back into the 1930's. Both remaining insurers, Continental and Pacific, denied coverage for claims where exposure to asbestos took place outside their policy years and illness was diagnosed decades later. No one could even find the Pacific policy. Pacific contested that the policy ever existed, and claimed that if it did, it carried a $1 million aggregate limit. While Fibreboard prevailed at the trial court, the insurers pressed on appeal serious and substantial issues that could destroy coverage. Unpaid Fibreboard asbestos settlement debts by 1993 amounted to $1.2 billion, enough to wipe out Fibreboard five times over.

A series of disputes ensued which were related to but separate from the coverage litigation. One of them pitted Fibreboard against Continental as to Fibreboard's asbestos settlements, done without Continental's consent, using assignments of proceeds to Continental's policy. In another, Continental was aligned against Pacific and Fibreboard arising from the effort by the latter two parties to rescind the Pacific policy in return for money to pay uninsured claims, that is, claims where first exposure to asbestos occurred after 1959. Pacific's obligations to pay depended both on results of the coverage case, and the obtaining of an order protecting Pacific from contribution claims by Continental. Both of those disputes were in litigation in 1993. A third arose from Fibreboard's attempt to accomplish a massive global settlement over Continental's objection using assignments to proceeds of its contested policy.

An April 9, 1993 Agreement between Continental and Fibreboard, reached under pressure of burgeoning assignment settlements to which Continental was exposed, litigation to protect Pacific from Continental, and negotiations for a potential global settlement over Continental's objection, obliged Continental and Fibreboard to use best efforts to achieve a global deal which would cover both insured claims, and claims that neither policy insured, solely with insurance money.

The claimants possessed not only interests in their present and future personal injury claims, but also interests in the Fibreboard policies. The class parlayed those dual interests, the benefits of the April 9 Agreement, and the impending final arguments in the coverage litigation before the California Court of Appeal, into a global settlement that capitalized on the claimants' interests in the policies, settled the coverage litigation, took $1.5 billion of the insurance money (the rest going to pay prior settlements and pending claims), and devoted it to the class.

One does not settle an insurance coverage case such as this piecemeal. The insurers paid an enormous amount of cash to buy out their policies and the contested obligations under them. Just as happened with the Trilateral Settlement, which petitioners applaud, the global settlement protected the insurers from further

claims under these policies. Fibreboard, being asked to turn over to the class the entirety of its remaining insurance, insisted that the proceeds of that insurance protect it as well.

The case assuredly is not like *Amchem Products*. It is not, as petitioners claim, tort reform by judicial fiat. It does not furnish any road map for other defendants faced with mass tort or other claims. The record here does not support petitioners' characterizations of the case, and hence does not supply any basis for the multiple-part question petitioners say is presented.

Finally, petitioners point to the Trilateral Agreement insurance settlement which they assert was reached independently and which itself removed the coverage case risk. But the insurance settlement was not reached independently at all, it was entered into purely in connection with and as a backup to the global settlement, after all earlier efforts to achieve a separate insurance settlement had failed miserably. The parties simply did not have any insurance settlement when they reached the global settlement agreement. And the insurance settlement was confirmed through a mandatory class action consisting of the same *Ahearn* class members involving the same interests in the same insurance policies, all of which petitioners embraced, as was the global settlement, which they here challenge.

This case presents no issue warranting review by this Court.

STATEMENT OF THE CASE

A. The Only Potential Source of Recovery for the Class, Fibreboard's Insurance, Was Subject To a Significant Risk of Total Loss.

From 1920 to 1971, Fibreboard manufactured asbestos-containing products as a diversification from its primary business, which was timber. (App. 38a, 260a). This product line placed Fibreboard squarely in the middle of asbestos products liability litigation. It has been there since the start. *See, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

Fibreboard always was of modest size. In 1995, its net worth, assuming no asbestos liabilities, was at most $235 million. (App. 277a).[1] In earlier years, when Fibreboard was trying to confirm insurance for its escalating asbestos liabilities, the market valued Fibreboard at as little as $10 million. (App. 277a).

Given its limited assets, Fibreboard needed insurance coverage in order to defend and pay asbestos personal injury claims. Fibreboard and other companies with asbestos liabilities litigated coverage for these claims against dozens of insurance companies in a California state court. This coverage litigation was "one of the largest and most complex in the history of American civil jurisprudence, . . .". (App. 267a). It began in 1979 and, after massive pretrial discovery and a multi-phased trial, ended with a trial court judgment entered in January 1990. (App. 267a-269a).

In 1985, Fibreboard entered into the multi defendant and insurer Asbestos Claims Facility ("ACF") and in doing so, settled with a number of its insurers. (App. 262a-265a). In 1988, Fibreboard's relationship with the ACF ended. Fibreboard then found itself sued by increasing numbers of asbestos claimants,[2] yet, its participation in the ACF had exhausted all but two of its insurance policies.[3]

Those two policies are at the crux of this case. Both were heavily involved in the California state court coverage litigation. First, although it was unable to locate a copy of the policy, Fibreboard contended that Pacific Indemnity Co. had issued a primary liability policy to Fibreboard for one year spanning 1956 to 1957 and that this policy had no aggregate limit on the total amount payable for product claims. Pacific denied issuing the policy and refused coverage. (App. 266a). Second, Continental Casualty Company had issued a primary policy to Fibreboard

1. Citations to the Ortiz petitioners' Appendix are "App. __." Fibreboard's Appendix is cited "FA __."

2. Indeed, Fibreboard's participation in the ACF had, if anything, increased the rate at which Fibreboard was sued as a defendant by claimants. (App. 265a).

3. The only other insurance funds consisted of approximately $100 million remaining from settlements with two excess insurers with whom Fibreboard had settled separately from the ACF settlement. (App. 266a).

that remained in force for twenty-two months, ending on March 15, 1959. Fibreboard did have this policy and, while it had a $1 million "per occurrence" limit and a $500,000 "per claim" limit, the policy did not contain any aggregate limit for products claims (App. 266a). Continental denied coverage under its policy.

1. The trial court in California ruled that policies spanning less than three years provided extensive coverage for exposures and claims extending over decades.

Many of the asbestos claims against Fibreboard arose out of exposures (*e.g.*, at World War II shipyards) prior to the mid-50's. (App. 260a-262a). Given the long "latency" period for the development of asbestos-related disease, asbestos claims did not start being filed in large numbers until the 1970's and 1980's. (App. 253a). Fibreboard needed to establish that the Pacific and Continental 1956-1959 policies covered these claims, even though the exposures may have pre-dated the policies and the diseases were diagnosed and lawsuits were filed many years after the end of the policy periods.

First, however, Fibreboard had to prove up the existence and terms of the Pacific policy. A jury found that Pacific had issued the policy to Fibreboard, and by a minimum 9 to 3 vote determined that the policy had no aggregate limit on the amount of dollars it would pay. (App. 268a).

On the common coverage issues, the trial court in 1987 ruled that there was coverage under every policy between the time of an asbestos claimant's initial exposure and the time suit was filed, *i.e.*, that each of these policies was "triggered" with respect to the claim. (App. 268a). *See Armstrong World Industries v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 43-45, 52 Cal. Rptr. 2d 690, 702-03 (1996). The trial court also ruled, on the "scope" issue, that every triggered policy had a full, independent obligation to pay for all of the costs of defense and indemnity on a claim, up to the amount of the policy limit, even though the policy was only in force for a portion of the total period of time that elapsed between the plaintiff's first inhalation of asbestos and suit. (App. 268a-269a).

Finally, in 1988, the trial court rejected an argument by Continental that under the "occurrence" definition in its policy, all of the asbestos claims constituted just two "occurrences" (corresponding to the two Fibreboard plants which were the source of asbestos-containing products), and hence its total liability under its policy was $2 million. The trial court found, instead, that each individual asbestos claim constituted a separate "occurrence". (App. 269a).

These rulings, in combination, exposed Continental and Pacific to enormous potential liability. They also gave Fibreboard a chance to survive the relentless asbestos litigation. For plaintiffs who inhaled asbestos at any time before the Continental policy lapsed, March 15, 1959 (such claims were called "pre-1959 claims"), Fibreboard could look for coverage under at least one of the Continental and Pacific policies, and those policies never could be exhausted.

2. The insurers appealed raising substantial issues.

Continental and Pacific appealed from the trial court's January 1990 judgment. For the insurance to provide any substantial source of recovery, it was critically important to sustain *all* of the court's rulings. Reversal of either the trigger or scope ruling would virtually destroy coverage. A reversal of the jury's no-aggregate limit verdict on the Pacific policy would leave Fibreboard with only a minimum amount payable under a 1992 settlement with Pacific, described at p. 11, *post*. A reversal on the trial court's decision on the "occurrence" definition would leave Fibreboard with only $2 million of coverage under the Continental policy.

On the trigger issue, some appellate courts had found coverage only under policies in effect during the time a claimant was exposed to asbestos.[4] Others had limited coverage to the policy in effect

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4. *E.g., Ins. Co. of North America v. Forty-Eight insulations*, 633 F.2d 1212, 1218-1220 (6th Cir. 1980), *clarified*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981).

when the injury resulted in a manifest asbestos disease[5]. Thus, for example, if a plaintiff working in a World War II shipyard inhaled asbestos, went to college after the war and took a white-collar job thereafter, never to encounter asbestos again, and then became sick in 1985, the Continental and Pacific policies would not cover such a claim under either theory because there was no exposure and no manifest disease during the years 1956 to 1959. By contrast, under the California trial court judgment, the Continental and Pacific policies both provided coverage.

Rulings on the scope issue had differed too. Some courts had found that where multiple policies are triggered for a claim, each policy is required to pay only a pro rata portion of the costs of the claim. *E.g., Ins. Co. of North America v. 48 Insulations, supra.* Some of these courts also required the insured to pay a pro rata portion of the costs for periods of no insurance or exhausted insurance. *Id.* Under either theory, most of the coverage would disappear.

The district court in this case expressly found, based upon expert testimony of Marcus Kaufman (former justice of the California Supreme Court) and George Priest (Professor of Law at Yale) that there was a significant risk that Fibreboard would lose one or more of the critical issues on appeal. (App. 275a). There was no margin for error. Any loss, on any issue, would be a disaster, both for Fibreboard and for the asbestos claimants. In the summer of 1993, the California appellate court held arguments on the appeal of the Coverage Case, with the last of them scheduled for August 27. (App. 270a). At that argument, the Court announced that it expected to issue its opinion soon thereafter. (App. 270a).

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5. *E.g., Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

B. Fibreboard Proposed and Claimants Accepted Settlements That Looked To The Insurance Assets For Payment, But Most of Them Created More Disputes With Continental.

As it left the ACF in 1988, Fibreboard lacked the cash needed to pay the ever-escalating liabilities presented by claimants in the asbestos litigation, but it recently had gained favorable coverage rulings in the trial court. Accordingly, Fibreboard developed the "Structured Settlement Program," or "SSP." Fibreboard agreed to settle cases with claimants by deferring immediate cash payments on anywhere from 60 to 100 percent of the amount of the settlement, pending the outcome of the coverage litigation. These settlements contained restrictions on Fibreboard's corporate activities, to ensure plaintiffs that if Fibreboard lost the coverage litigation they would at least have the company as a recourse. (App. 277a-279a). The SSP found acceptance among plaintiffs, although settlement values increased, given the risk of non-payment. (App. 279a).

The plaintiffs' asbestos bar understood that the only hope for significant payments from Fibreboard depended on victory in the coverage litigation. Indeed, plaintiffs' counsel in the asbestos personal injury cases kept themselves well informed of developments in the state insurance coverage appeal. (App. 298a; FA 27a-28a; Tr. 643-644, 903). Steven Kazan, a prominent California asbestos lawyer, was optimistic about Fibreboard's prospects in the Court of Appeal, but privately was "scared to death" about the chances in the California Supreme Court. (FA 29a; Tr. 911-912).

However, the SSP proved unworkable for the settlement of large groups of cases. (App. 281a). Fibreboard found itself in consolidated trials in Texas, West Virginia, Baltimore, and New York, and ran out of defense money because its defense costs exceeded the amounts provided for in a 1988 interim agreement with Continental and Continental refused to pay more. (App. 281a-282a). Consequently, in early 1991, Fibreboard started settling claims by paying no money, but agreeing upon dollar values on the claims. For pre-1959 claims, Fibreboard then assigned to the

settling plaintiff a right to a share of the proceeds from any recovery under the Continental policy; for post-1959 claims (where first exposure to asbestos was after March 15, 1959), settling plaintiffs continued to receive SSP's. (App. 285a). Again, Fibreboard agreed to keep the company intact as a recourse in the event it lost its insurance coverage. (App. 286a).[6]

Assignment settlements were for substantially larger amounts than the SSP settlements ($11,400 average v. $5,400 average). This occurred not just because any payment was subject to the risk of an unfavorable outcome in the state insurance litigation appeal. In addition, Continental vehemently objected to the assignments, contending that they were invalid and vitiated coverage by breaching cooperation clauses in the Continental policy. (App. 286a). Considerable litigation between Fibreboard and Continental ensued over the validity of these assignments. (App. 287a-291a). The assignment settlements were particularly "unfriendly" to Continental, as Continental was faced with the prospect of eventually having to pay for a large number of settlements at ever escalating values which Continental had no say in negotiating. (FA 20a-21a, 30a; Tr. 231-232; 1325-26). By January 1993, the individual assignment settlements totaled almost $1 billion, including a $260 million settlement of 20,000 cases with the Ness, Motley law firm. (App. 302a-303a).

C. Pacific Indemnity and Fibreboard Converted Pacific's Contested Policy Into a Finite But Contingent Asset to Pay Uninsured Claims, Leaving Continental With A Major Risk.

As noted, under the trial court's coverage case rulings, either the Continental or the Pacific policy, or both, covered claims as to which the first exposure to asbestos occurred before expiration of Continental's policy. Those rulings made the coverage under the Pacific policy duplicative of that under the Continental policy. The Pacific policy would be triggered by any claim involving exposure to asbestos prior to May 1957, and responsible up to its $500,000 per person limit. The same was true of the Continental

6. Of course, since asbestos claimants were unsecured creditors, they would share in Fibreboard assets only after its secured creditors were paid.

policy for any claim involving exposure at any time prior to March 1959.

Neither the Pacific nor the Continental policy covered any claim where first exposure to asbestos occurred after March 15, 1959, the expiration of Continental's policy. These post-1959 claims had to be dealt with. The solution lay in the duplicate coverage provided by the two no-aggregate policies. In 1992, Fibreboard and Pacific reached an agreement to rescind the Pacific policy. In return, Pacific agreed to make funds available for post-1959 claims. The amount payable by Pacific would range from zero to $330 million depending upon appellate rulings in the coverage case. The largest portion of the settlement ($225 million) was also contingent on Fibreboard obtaining a judicial determination that the settlement and related rescission eliminated Continental's right to obtain contribution from Pacific on pre-1959 claims paid by Continental. (App. 284a-285a). Any such judicial decision would leave Continental, under the trial court coverage rulings, with the entire cost of all of Fibreboard's pre-1959, insured, asbestos liabilities up to its $500,000 per claim limit, with no aggregate cap.

D. Embroiled In Conflict And Facing Coverage Case Appellate Arguments, The Insurers Agreed To The Global Settlement With The Class And Fibreboard.

1. Early Global Settlement negotiations had failed.

As early as 1991, Fibreboard began exploring the possibility of negotiating a complete resolution of the asbestos personal injury litigation. It did this, in large part, because of *Linscomb v. Pittsburgh-Corning Corp., et al.*, an action filed in the district court below in July, 1990. *Linscomb* alleged a Rule 23(b)(1)(B) litigation class action on behalf of present and future asbestos claimants against Fibreboard and others. (App. 256a, 292a; Fibreboard Trial Exh. 116). Fibreboard felt if it did not nail down a global settlement, it would be prosecuted in *Linscomb* or some other class action. (FA 24a; Tr. 453-454). Fibreboard commenced negotiations with lawyers from the law firm of Ness, Motley, etc. Any global settlement without Ness, Motley involvement would

not be credible, as even Mr. Baron, counsel for petitioners here, acknowledged. (FA 26a; Tr. 516-517).[7] Steven Kazan and Harry Wartnick, the other lawyers with whom Fibreboard negotiated, were Fibreboard's chief adversaries on the West Coast, were among the most knowledgeable counsel about Fibreboard, and were looked to by other plaintiffs' lawyers for guidance on Fibreboard matters. (App. 293a, 389a). These negotiations excluded Continental, which continued to dispute coverage. (App. 301a). But the global negotiations with these supposedly "cooperative plaintiffs' lawyers" (Petition 26) stalled in late 1991, mainly because of the inability to resolve issues regarding opt-outs and co-defendant contribution and indemnity claims. (App. 300-301a).

2. Under pressure, Continental committed best efforts to accomplish a global settlement covering all claims.

In 1993, the cumulative effect of the events of the past fourteen years resulted in an agreement between Fibreboard and Continental which, in turn, led to the global settlement that is the subject of this case.

In January 1993, Fibreboard sued Continental in the district court below, Judge Robert Parker presiding. (App. 303a). This suit sought to validate the assignment that was a part of the massive Ness, Motley 20,000 case settlement (*ante*, p. 10).[8] If successful, it would bind Continental to all the assignment settlements, past and future. Fibreboard also sought the ruling which was a condition to

7. The Ness, Motley firm: controlled over 50% of the asbestos personal injury cases pending around the country, including those pending against Fibreboard (FA 21a; Tr. 303-304); had been involved in virtually all the major trials against Fibreboard (App. 293a); and was on the *Linscomb* class action steering committee. (App. 256a).

8. Fibreboard had obtained a judgment in 1992 from a California Superior Court in Mr. Kazan's *Andrus* case upholding the assignment mechanism, but Continental took an appeal, so the judgment was not *res judicata* pending final decision. (App. 289a-290a). The California Court of Appeal eventually reversed that judgment, but not until October, 1994, long after the global settlement had been reached. (App. 198a, n.5).

obtaining $225 million of the Pacific settlement —that Continental could not obtain contribution from Pacific, and thus would have to bear the entire costs of Fibreboard's insured asbestos liabilities. (App. 303a; FA 32a; Tr. 1328-29).

Facing the risks of the outcome in the state insurance coverage appeal, the increasing liabilities represented by the assignment settlements, and the litigation before Judge Parker to validate the assignments and to insulate Pacific from any contribution obligation, in April 1993 Continental reached with Fibreboard what was called the April 9 Agreement — a seminal event for all the parties. (Fibreboard Trial Exhibit 908). Fibreboard agreed to stop settling cases by assignment of proceeds of the Continental policy. In return, Continental agreed to use best efforts to achieve a global settlement of *all* Fibreboard's asbestos liabilities, present and future, insured and uninsured, all to be paid for by insurance. (App. 308a-309a). This was a commitment Fibreboard viewed, and believed Continental did too, as a standard to which Continental could be held. (FA 22a; Tr. 310).

3. Global negotiations finally succeeded on the eve of the coverage case appellate argument.

Global settlement negotiations followed the April 9 Agreement, under the auspices of Judge Patrick Higginbotham of the Fifth Circuit, who had also acted as a settlement facilitator with respect to the negotiations resulting in the April 9 Agreement. (App. 304a, 320a). The initial negotiations ended in acrimony, with the "cooperative plaintiffs' lawyers" (Petition 26) walking out and declaring negotiations at an end. (App. 312a). Global negotiations did not resume again in earnest until August, but they were impeded by the refusal of Pacific to participate in a global settlement. (App. 319a-321a, 324a-325a). Finally, over the weekend of August 22, Pacific agreed in negotiations with Continental to contribute to the funding of a global settlement. (App. 325a). Immediately thereafter, Continental made an offer of $1.3 billion, which plaintiffs' counsel rejected. Continental then offered $1.5 billion, viewing the increase as roughly equal to Fibreboard's value, and offering it because plaintiffs' counsel kept demanding Fibreboard's net worth, which was not on the table

due to the April 9 Agreement. (App. 326a-327a). Plaintiffs' counsel rejected that, too, and precipitated a trip to Judge Parker's court in Tyler, Texas, where the parties convened on August 26. (App. 327a-328a). This was Judge Parker's first direct involvement in the global settlement discussions.[9] The parties finally reached agreement on the settlement price of $ 1.535 billion on the morning of August 27, the day of the final argument in the coverage case. (App. 328a-329a).[10]

The global settlement eliminated the risk that class members would have no recovery from Fibreboard, either because Fibreboard lost the state insurance coverage appeal, or Continental was able to invalidate the assignment settlement program and destroy any coverage that otherwise might have existed. The district court found it more probable than not that all class claims will be paid at fair and appropriate values, although payment of some may have to be deferred. (App. 359a). Indeed, petitioners have never challenged the global settlement as too little, or as leaving money on the table. *(See post,* n.11). All claims are channeled to a Trust, controlled by three independent trustees, two of whom the claimants' attorneys select. Each class member's claim will be resolved on its own merits through the Trust procedures. Having settled out their policies, Continental and Pacific are protected from suit. Having given over all of its insurance and the significant

9. The Petition states that Judge Parker "orchestrated the settlement negotiations" (p. 3) citing the panel opinion at pp. 45a-47a. But the panel opinion there refers only to the discussions at which Judge Parker was present on August 26. By then, plaintiffs' counsel already had received a $1.5 billion offer, which they privately had decided was acceptable, but rejected it anyway and held out for more. (App. 327a-328a).

10. The Petition does not claim that the global settlement amount is too little or unfair. It does not contend that class counsel lacked leverage or ability to obtain the optimum settlement for the class. Nor could it. With over 50% of the cases, Ness, Motley had plenty of leverage. These were the lawyers who could have destroyed Fibreboard in *Cimino v. Raymark Industries,* 751 F. Supp. 649 (E.D. Tex. 1990). Kazan and Wartnick were Fibreboard's principal adversaries on the West Coast. And now these counsel were armed with Continental's best efforts commitment in the April 9 Agreement, a matter Fibreboard pressed with a letter of July 9, 1993, which Continental viewed as setting it up for a bad faith claim in the event that global negotiations did not succeed. (FA 34a-35a; Tr. 1397-98, Fibreboard Trial Ex. 583). And these plaintiffs' lawyers had available the high Ness, Motley assignment settlement values and used them to ratchet up the global price. (App. 407a).

fruits of over a decade of contentious litigation, and having gotten the insurers to contribute additional funds to substitute for Fibreboard's net worth, so is Fibreboard.

4. The insurers and Fibreboard agreed to a "backup" insurance settlement, approved by way of a mandatory class action.

On August 27, during the last of the negotiations leading to agreement in principle on the global settlement, plaintiffs' counsel continued their earlier insistence upon a backup insurance settlement between Fibreboard and the insurers, to have in place if the global settlement did not achieve final court approval. (App. 329a-330a). This settlement was not actually reached until September, after another series of intense negotiations. (App. 332a-333a).

This back-up insurance settlement, or Trilateral Agreement, provided for $2.0 billion, but that amount is substantially less beneficial to the class. Funds from the backup settlement must be used not only to pay the claims of class members, but also tens of thousands of unsettled non-class claims pending in courts around the country. (App. 354a-355a). Additionally, the backup settlement did not include any money for defense costs, which can equal or even exceed amounts paid for indemnity in mass tort, personal injury litigation. (App. 362a-363a; FA 24a; Tr. 379-81).

The petition asserts that the Trilateral Agreement, which petitioners support,[11] "guarantees that Fibreboard will have ample

11. The backup settlement, in the view of petitioners' counsel, Mr. Baron, is a "superior settlement," a "great settlement" (FA 17a; Tr. 89), which represents the most the insurers were willing to pay. (Baron Amicus Br., FA 8a). Yet the backup settlement will deliver far less — hundreds of millions of dollars less — to claimants than would the global settlement. (App. 361a-362a). One major difference is that the global settlement caps the contingency fees of plaintiffs' lawyers at 25%, compared to the 33%-40% fees available under the backup. (App. 365a). The same concern about the level of contingency fees prompted many filings prior to the injunction in this case. (FA 25a; Tr. 464-65). The Baron & Budd law firm filed some 4,000 cases on August 27, 1993, claiming that they were "present" cases and, therefore, would not be subject to the 25% cap on fees. (FA 35a; Tr. 1505). Similarly, the district court observed that one of the primary objections of the Jaques law firm, which represents petitioners in number 97-1695, was the 25% limit on attorney contingency fees. (App. 185a, n.2).

insurance coverage with which to pay future asbestos claims." (Petition 4). The record is to the contrary. The district court found, citing testimony and exhibits, that

> there is a significant risk that the Trilateral Agreement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Global Health Claimant Class without compensation. . . .

(App. 359a).

The petition also asserts (pp. 3-4), that the insurers and Fibreboard "independently agreed" to the back-up insurance settlement. That assertion is contrary to the record as well.

As early as 1988, Fibreboard and the insurers talked about a possible coverage settlement; but it was clear that they couldn't agree to one. (FA 18a; Tr. 172-173). In early 1990, before the inflationary "assignment" settlement program was inaugurated, Fibreboard suggested complete policy settlements with both Pacific and Continental, but Continental declined. (App. 282a; FA 19a-20a; Tr. 185). Again, in the summer of 1993, with the global settlement negotiations at impasse, Fibreboard and Continental discussed the possibility of an insurance settlement. They were not even close. (App. 313a-314a).[12] Rather, the backup settlement

12. Meyer Koplow, for Continental, testified that the last meeting "would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. . . ." He

> came away with the conclusion not only that it would be a long time before we could put some of the people who had been in the room back in a room together again — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral.

(FA 32a-34a; Tr. 1377-79). He saw "no chance" of achieving a separate insurance settlement. (FA 34a; Tr. 1379-80). Stephen Snyder, Fibreboard's lead counsel, testified "it was very clear that we weren't going to be able to do that sort of deal." (FA 22a-23a; Tr. 316-17).

came about only because plaintiffs' counsel insisted upon it. (App. 329a, 332a). The insurers took the position, and adhered to it, that they would pay no more for the backup settlement than they would for global settlement. Fibreboard insisted that it needed much more money with which to pay defense costs. Finally, Fibreboard agreed to the insurers' position, but only as the price of obtaining the global settlement. (App. 329a-330a; FA 23a; Tr. 335-336). It was to get the global that Fibreboard agreed to Continental's terms; "[o]therwise, no way would [Fibreboard] have entered into that settlement." (FA 26a; Tr. 593-94).

Thus, as a matter of fact in this case, there was no backup insurance settlement reached independently of the global. When the global settlement was initially agreed to, there was no other settlement to fall back on and, therefore, the class faced the risk of getting nothing absent the global settlement.

In order to validate the backup insurance settlement, the insurers brought a mandatory class action, *Continental Casualty Co. v. Rudd,* in the district court below against a class of persons virtually identical to the *Ahearn* global "futures" class. The insurers sought, and obtained, not just a declaration that the insurance settlement was fair and reasonable, as the petitioners say (Petition 4, n.4), but also a judgment discharging the insurers from any obligation under their policies, and an injunction prohibiting class members from asserting claims against the insurers. In stark contrast to their position here, petitioners supported the *Rudd* mandatory class. They filed an amicus brief in the Fifth Circuit acknowledging the merits of the backup settlement, the standing of the class members with respect to it, and the propriety of the mandatory class. (Baron Amicus Br., FA 4a, 11a-12a). The Fifth Circuit affirmed Judge Parker's judgment in *Rudd* in the insurers' favor. (App. 93a-97a).

REASONS FOR DENYING THE WRIT

I. THE PETITION MISCHARACTERIZES THE LEGAL AND ECONOMIC INTERESTS AND RISKS INVOLVED AND DOES NOT PRESENT QUESTIONS IN RELATION TO THE CIRCUMSTANCES OF THIS CASE.

The case that the petition presents to this Court is not the case presented by the record. Petitioners would have the Court take a case where a solvent company faced with a theoretical risk of insolvency someday due to a stream of future asbestos liabilities conceives a plan to foreclose them through a class action. With the connivance of its insurers, cooperative class counsel, and a judge bent on tort reform, they announce that the insurers will pay X dollars, and that is the limit. The X dollars is therefore a "limited fund," all future claimants are forced into a mandatory class with no regard to distinctions among them, all their state law tort rights (which is all they had) are sacrificed for an ADR process, and the tortfeasor and its insurers go on about their business free of all asbestos liabilities. This, petitioners would say, is exactly like *Amchem Prods. v. Windsor*, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997), only worse because no class member can opt out. They say that other malfeasors in corporate America anxiously wait to see if they too can follow this road map.

The record does not support the case put by the petition. The record supports these essential facts, instead.

1. By 1993, when the class action was filed, Fibreboard had incurred a settlement debt of $1.2 billion, and had numerous asbestos cases pending against it, not to mention future ones, as against a net worth (not counting asbestos liabilities or insurance) of $235 million. Absent insurance no class member would recover any money.

2. The insurance asset could be very large, or it could and would be worth nothing to the class if Fibreboard lost its insurance coverage in the coverage case or otherwise.

3. Fibreboard and its insurers had shown that they could not settle separately the coverage dispute.

4. The insurers were under pressure to achieve a global settlement to fulfill Continental's commitments in the April 9 Agreement (itself the product of a unique chain of events likely never to be repeated) and to avoid what may be a disastrous loss on appeal about to be argued.

5. The insurers in these special circumstances offered to settle the coverage case and cash out their policies including over $1.5 billion for the class — a sum no one claims is unfair.

6. The class members held legal, not to mention overwhelmingly important economic, interests in the policies which could either: (a) be realized with an enormous sum turned over to the class; or (b) put totally at risk by decisions in the coverage case.

7. By reason of the foregoing, the case fell within Rule 23(b)(1)(B), and the class could remove the risk common to all and take the property in which all had an interest.

This petition does not present questions in relation to the circumstances of this case. Had petitioners fairly taken account of the unique facts and actual legal interests demonstrated to exist by the record in formulating their questions, the Court could evaluate properly whether the case merits review. But they did not. And the case is fact-bound to an unusual degree. The extent of commonly held legal and economic interests by all class members *and* the opportunity to eliminate the common risks to all of those interests — the circumstances which place this case within Rule 23(b)(1)(B) — are not likely to ever rise again. For these reasons alone, the Court should deny this petition.

II. IMPROPER CHARACTERIZATIONS OF THE CASE CUT ACROSS PETITIONERS' SUBSTANTIVE ARGUMENTS.

The Brief for Continental Casualty Company and Pacific Indemnity Company sets forth in some detail why petitioners' legal arguments fail. Below we briefly describe why much of what petitioners argue on the merits does not comport with the record.

A. Petitioners' Rule 23(a) Contentions Misapprehend The Lower Court Decisions And The Reasons For Them.

Petitioners claim that the lower courts applied a tainted standard, substituting the settlement for Rule 23(a) standards and identifying the common issues by reference to the settlement. (Petition 11-12). The Fifth Circuit actually held that the "district court can and should look at the terms of a settlement," because "settlements and the events leading up to them add a great deal of information" and "will often expose diverging interests or common issues that were not evident or clear from the complaint." (App. 55a-56a). *Amchem Products* agreed: "settlement is relevant to class certification." 117 S. Ct. at 2248. And the district court here wrote that it "approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement content than in the litigation context." (App. 224a). Number one on the list of common issues for both the district court and the Fifth Circuit was avoiding the potentially disastrous results of a loss by Fibreboard in the coverage case appeal. (App. 56a, 225a, 415a).

The *Ahearn* class had just as much a common interest in eliminating that risk (and in *Ahearn*, seizing control of the fund thereby created) as did the *Rudd* class. In *Rudd*, these same petitioners urged that the Rule 23(a) requirements were satisfied. (Baron Amicus Br., FA 14a-15a). That same interest *did* preexist any settlement. (Petition 12). And all class members did have a preexisting legal (and extremely important economic) interest in the policies under such cases as *Shapiro v. Republic Indem. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959), properly referred to in the complaint. (App. 556a-559a). This is far more and much different than the mere "common interest in a fair compromise" to which petitioners refer. (Petition 13).

The petition also claims conflicts existed within the class between "currently injured" and "exposure-only" claimants just like in *Amchem Products*, (Petition 13-14) and insists on "structural assurance" of fair representation.

As this Court put the question in *Amchem*, the requirements of Rule 23(a) and (b) focus on "whether a proposed class has

sufficient unity so that absent members can fairly be bound by decisions of class representatives" — whether through settlement or trial. (117 S. Ct. at 2248). Any class member, or counsel,[13] could adequately represent the class with respect to the overriding common goal — the elimination of the coverage risks and the consequent establishment of a fund of money for the payment of class claims — an issue in which the class plainly had a unitary interest. Petitioners therefore insist there are conflicts within the class with respect to allocation of the fund which undermine the class's ability to pursue this common goal. Once it is conceded, however, that a class has a right and a unitary interest in pursuing and obtaining the fund, some way must be found to share in it — and that is another reason for the mandatory class. To assert that the inherent need to share the fund equitably among its members precludes the class from acting in concert to achieve its common goal of preserving and obtaining the fund would defeat the very purpose of a *mandatory* class.[14] Unlike *Amchem Products*, this is not a case where the defendant keeps the money and decides how

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13. In a footnote, petitioners say class counsel had a conflict because they simultaneously settled claims for their own clients outside the global settlement. The global settlement did not include any claims already filed in court — those of clients of class counsel or of any other lawyers. At the time Ness, Motley settled claims of its clients, global discussions were in a preliminary, exploratory stage. (App. 65a). Only after the Ness, Motley settlement did counsel reach an agreement on a number of future claims to use as a benchmark in negotiations, Pacific was persuaded to join, plaintiffs' counsel refused to include current claims in the global settlement, and the insurers offered $1.3 billion and then $1.5 billion. (App. 321a-327a). Nor was the Ness, Motley settlement contingent on a global deal, as petitioners claim. (Petition 8). Rather, one-half the settlement was payable on an insurance settlement, the outcome of the coverage case, or a global; the other half was paid up front. (Tr. 1245-1246).

14. Here, petitioners completely misread the import of the Court's statement that, even though *Amchem Products* was not a limited fund case, the settlement reflected "essential allocation decisions" (117 S. Ct. at 2251). Petition at 13-14. Read in context, the Court clearly was referring to the fact that, by their very nature, Rule 23(b)(1)(B) actions involve allocation decisions and this is not so as to a Rule 23(b)(3) class.

it will parcel it out on individual class member claims, with an inherent incentive to minimize the total liabilities paid, and without any effective recourse to the courts for class members. Here, the class has the money and its motive is to distribute the entirety of the fund in a manner that is equitable to the class as a whole.[15]

Of interest on this point is what petitioners do not say. They do not now, and did not at the trial below, argue that the allocation mechanism contained in *Ahearn* is in fact unfair or unreasonable from the standpoint of the class as a whole. Instead, petitioners embrace the Trilateral Agreement as a solution for the class. They say that this settlement, and the effect it has on allocation of the insurance funds among the class, is fair and reasonable — indeed a "great settlement." (FA 17a, Tr. 89). Presumably they do so because it would permit petitioners unlimited access to the insurance fund for their claims and the devil take the hindmost as to the rest of the class. The Trilateral Agreement itself works an allocation because it converts the policies with their $500,000 per claim limits — precisely the same as with the Global Settlement — into a fund subject to raids by current claimants and at the expense of future ones.

The Global Settlement, in contrast, follows fairly closely the result in the tort system, assuming Fibreboard prevailed in the coverage case so there is any money for any claimants.[16] This

15. Petitioners' solution — *i.e.*, a *Rudd*-type settlement — ignores the class's inability to bring about a settlement between Fibreboard and the insurers, as graphically demonstrated by the insurers' and Fibreboard's own failed efforts to reach a settlement. And, as noted below, it champions a result that inequitably favors one portion of the class over another.

16. Once the class obtains the fund it makes no sense to permit punitive damages against a blameless claimant-controlled Trust. And with possibly one exception, Fibreboard never paid punitive damages. (App. 338a). As noted, the $500,000 per claim cap corresponds to the policy per-claim limits, and there have been only about a dozen individual Fibreboard settlements over that figure (App. 339a) out of over 104,000 asbestos claims resolved through 1992 (Fibreboard Trial Exh. 705, p. 41). Unlike the settlement in *Amchem Products*, the Global Settlement does not specify dollar amounts or ranges for recoveries for various diseases, but leaves that up to individual adjudications.

Court in *Amchem Products*, 117 S. Ct. at 2251, noted the ability to look to the terms of the settlement (not just structure of negotiations) to assess adequacy of representation. The petition does not identify a single instance where the settlement terms bespeak inadequate representation.[17] It presents no compelling reason for review to scrutinize compliance with Rule 23(a).

B. The Petitioners' Arguments That A Mandatory Class Is Impermissible Overlooks The Legal And Economic Interests At Stake.

The petition takes a one-dimensional view of the state law rights held by class members, characterizing them repeatedly as *in personam* personal injury claims against Fibreboard. It argues that the only way to alter those rights in order to provide relief for late-arriving claimants is bankruptcy. These arguments do not take account of the other substantive state law rights claimants possessed,[18] and mistake Fibreboard's circumstance with that of a debtor simply facing too many claims with too little money.

1. The petition ignores the preexisting rights in the policies.

California law gave all class members legal interests in any resolution of the insurance coverage dispute between Fibreboard

17. In footnote 7 on page 14, the petition claims that structurally inadequate representation is evident in the way the pre-1959 claimants had to give up their insured claims to benefit others, citing Judge Smith's dissent. (*See also* Petition at 8.) That assumes Fibreboard won the coverage case. It ignores that the Pacific Indemnity policy was rescinded and replaced with an agreement to provide money for uninsured claims. It overlooks that Continental in the April 9 Agreement agreed to try to reach a global settlement of all claims — insured and not — with insurance money. And it forgets that the Trilateral Settlement, which petitioners champion, itself makes the insurance proceeds equally available for uninsured claims.

18. They also overstate the practicalities of the individual tort claims against Fibreboard. The petition argues that a class member who received a final judgment against Fibreboard could collect it in full and no other class member could interfere. (Petition 16). That would be correct *if* there were a Fibreboard left to sue or assets upon which to execute. The point of this entire proceeding was to eliminate the real and significant risk that there would be neither and that all the class members' legal interests in the policies, their only realistic source of recovery, would disappear very soon.

and its insurance carriers. Even petitioners recognize that class members were potential third-party beneficiaries of the insurance policies. (Pet. 4, n.4). And they acknowledged in *Rudd* that these same class members had legal standing with respect to a settlement of the policies. (Baron Amicus Br., FA 11a-12a). California law holds that an injured party (and each class member has been exposed to asbestos for which Fibreboard may be liable) is a third-party beneficiary of the defendant's liability insurance policy, and his or her interest cannot be altered by independent actions of the insurer and insured. Indeed, under the law of California, where Fibreboard was located and subject to suit by all class members, the rights of class members could not be conclusively determined in an action between the insurer and insured to which they were not parties. *See Shapiro v. Republic Indemnity Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).[19] Continental, Pacific, and Fibreboard could not settle the insurance controversy and finally determine the class members' rights to the policies unless they bound to that settlement, through litigation in which the members were parties, every claimant with any injury who might one day be able to assert a right against the insurers. Thus, the class had a state law interest, as third-party beneficiaries of the policies, in litigating the terms of any insurance settlement. Consistent with those rules, this Court held, in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), that litigation to bind a claimant with respect to insurance coverage issues, and thus affect claims under liability policies, present justiciable cases and controversies cognizable in the federal court.

The petition, therefore, is simply wrong when it claims that class members had no claims against specific property. They did,

19. In *Shapiro*, the insurer through post-accident litigation obtained reformation against the insured of the policy in such a way as to exclude coverage. The reformation judgment, to which the claimant was not a party, could not bind him as to his interest in the policy. The court relied on authorities from New Jersey, Ohio, Idaho, South Carolina, and the Sixth Circuit.

and the property was the insurance.[20] Because class members shared rights in that specific property, the petition is equally wrong when it asserts that the substantive rights of each class member are independent of every others'. (Petition 18). These flaws taint all of petitioners' arguments and justify denial of the Petition.

2. This is not a case for bankruptcy, as the petition claims, but one for Rule 23(b)(1)(B).

As well, the petition points to bankruptcy as the sole available solution and accuses the Fifth Circuit of trying to do a better job and legislating. The Fifth Circuit recognized — and petitioners do not contest — that Fibreboard could not be forced into bankruptcy and would not file for bankruptcy itself, preferring to wait out the coverage case if that was the alternative. (App. 78a-79a). This was not a debtor creeping toward bankruptcy, or as petitioners put it, a situation where "the mounting pressure of asbestos claims might someday have driven Fibreboard into insolvency" (Petition 9, 18), like the debtor in *Keene Corp. v. Fiorelli* (*In re Joint E. & S. Dists. Asbestos Litig.*), 14 F.3d 726 (2d Cir. 1993). This was all or nothing — either Fibreboard stayed healthy for an indeterminable time by winning the coverage appeal, or, after a coverage appeal loss, the lights went out, Fibreboard suddenly disappeared, so did its insurance, and the class members get nothing. The Fifth Circuit understood that and explained why the Global Settlement was driven by the insurance coverage litigation and the risks it posed to all the parties, and, therefore, why this case fits within Rule 23(b)(1)(B). Petitioners ignore it.

C. The Petition's Opt-Out Argument Suffers From Its View That Only Personal Damages Claims Existed.

The petition treats the class here as possessing nothing more than an aggregation of personal injury claims. It argues, too, that

20. Petitioners conceded in *Rudd* what they now attack. In their amicus brief in *Rudd*, petitioners likened the action to resolve the class members' rights to the insurance as being essentially one to "quiet legal title to a fixed asset." (Baron Amicus Br., FA 15a-16a).

the decision below conflicts with those in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) and *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). (Petition 22-24).

Petitioners claim that the panel majority conceded the first point by stating that the central remedial and legal theory of each of the named plaintiffs is Fibreboard's tort liability for damages. (Petition 23, quoting App. 58a). But they ignore what the Fifth Circuit recognized immediately thereafter:

> Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class.

(App. 58a).

As shown in the preceding section, the class members held legal interests in the insurance policies and in seeing that those interests did not go up in smoke through a coverage case loss.

Petitioners, therefore, ignore the facts that there was a risk of total loss absent unitary resolution, there was a way to eliminate that risk with a unitary resolution, and that is what the class accomplished. The resolution had to include all the class members. The insurers had either to settle the state insurance appeal or litigate it. This insurance coverage case, by its very nature, had to be resolved in a unitary fashion. Fibreboard, in turn, could not give over all its insurance to the class and leave itself exposed, defenseless, to a quick death at the hands of opt-outs, given the chance it might prevail on the appeal and thus use Continental insurance to cover pre-1959 claims and Pacific money to cover

post-1959 claims. Any resolution required participation by every constituency with legal interests in the policies.

In short, this case fell squarely within Rule 23(b)(1)(B), something petitioners do not contest, and the dissenting judge below expressly conceded. (App. 120a-121a, n.17, 130a, 132a). That Rule, in turn, is consistent with cases exemplified by *Smith v. Swormstedt*, 57 U.S. 288 (1854), which approved mandatory classes to resolve a matter of common interest. There is no right to opt out under those circumstances.

The *Brown* and *In re Real Estate Title* cases involved the same settlement which combined injunctive relief and foreclosed damages actions without paying any money for them. It was a hybrid settlement with separate injunctive and damages pieces. The personal injury claims here also create legal interests in the insurance policies, as well as extremely important economic interests in resolving the coverage disputes over those policies. The two are bound together, on this record, by the inability to settle one without the other. The case is not like *Brown* or *In re Real Estate Title*.

D. The Notice Issue Is Different Here Than In Amchem Products.

Amchem Products involved a settlement that fixed ranges of compensation for various diseases and required people to choose whether to opt out not knowing what disease they might contract. This settlement does neither. The purpose of notice here was for class members to decide whether to eliminate the "real and enormous risk" (App. 76a) to *all* class members arising from the coverage disputes, or whether to object to the proposed resolution. All class members had the same interest based on the same information as to this question — and even petitioners do not contend that any class member reasonably would decide to accept that risk. To the extent that conceivable objections could be conjured up, the Ortiz petitioners amply provided that service. As in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, notice received by some class members "is likely to

safeguard the interests of all, since any objection sustained would inure to the benefit of all."

E. This Class Action Which Transferred $1.5 Billion From Insurers To The Class Presented A Justiciable Controversy.

Once again, petitioners' arguments overlook that there were dual legal interests which class members possessed and which the class action proceeding redressed: their personal injury claims arising from exposure to Fibreboard's asbestos-containing products, and their interests in the insurance which could provide their sole source of recovery. This case resulted in a massive transfer of wealth from two insurers to a trust for the sole benefit of a class of people to satisfy both their interests in the policies, and their personal injury claims, now and in the future.

1. There was nothing feigned about the case.

The complaint pleaded exposure to Fibreboard asbestos by both the named plaintiffs and class members. (App. 553a-556a). It pleaded the insurance policies, the existing coverage controversy, and the likely inability of Fibreboard to compensate class members absent indemnification from the insurers. (App. 558a-559a). The issues that this class action resolved were whether the insurance controversies would end, the risk to the class would be eliminated, and the class would receive the money. Jurisdiction existed over those claims just as they did in *Rudd*. Contrary to petitioners' assertion (Petition 27), the judgment did redress claims pleaded in the complaint; for it made money available to compensate the class, whereas otherwise there may well have been none. Any argument that a pre-filing tentative settlement destroyed jurisdiction is answered by the consent decree cases. (*See, e.g., Swift & Co. v. United States*, 276 U.S. 371, 325-36 (1928); *S.E.C. v. Randolph*, 763 F.2d 525, 528 (9th Cir. 1994).

2. All class members had injury in fact.

Every class member had either exposure to Fibreboard products or claims derivative of such exposure, and had interests in the policies. They stood to lose as to both.

Simply as to the personal injury claims, the district court found that each member of the class, including each so-called "exposure-

only" claimant, had a good faith basis to argue for application of California law permitting recovery against Fibreboard, located then in California (App. 251a-252a), citing *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. Ct. App. 1993); *Barras v. Monsanto Co.*, 831 S.W. 2d 859 (Tex. App. Houston [14 Dist.] 1992, writ denied). And even if they did not, "jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1010 (1998), quoting from *Bell v. Hood*, 327 U.S. 678, 682 (1946).

As noted, the "judicially cognizable interests" (*Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997)) that were involved before the district court included the legal rights held by this class and every member of it under California law as to the insurance policies. Federal court standing even in a diversity case depends on the actual issue to be decided, and that issue need not be the claim pleaded in the complaint. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991).

Hence, the theory of standing unanimously approved as to the backup settlement by the Fifth Circuit in *Rudd*, and endorsed by petitioners there, applies here. The *Rudd* class was in a position to defend the insurers' suit on the ground that the settlement fund was insufficient, because it did not provide additional money for defense — precisely why Fibreboard balked at accepting the backup settlement amount. As members of the defendant class in *Rudd*, the global class could have insisted, as a condition to any settlement, that it get the money and institute an equitable method to distribute the funds among the class, the trade-off being that Fibreboard would obtain a release. That is what happened in this case.

CONCLUSION

The petition is defective because it does not properly present questions that arise on this record. This case is much different from *Amchem Products* or any other class action likely to be brought.

This Court should deny the petition.

Respectfully submitted,

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APPENDIX A — BARON AND BUDD FIFTH CIRCUIT BRIEF IN *CONTINENTAL CASUALTY CO. V. RUDD*

95-40694

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE ASBESTOS LITIGATION

CONTINENTAL CASUALTY CO., et al.,

v.

RUDD, et al.,

On Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division

***AMICI CURIAE* BRIEF OF ESTEBAN Y. ORTIZ, ET AL. IN SUPPORT OF APPELLEES**

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Appendix A

CERTIFICATE OF INTEREST OF AMICI CURIAE

No. 95-40694
Continental Casualty Co., et al. v. Rudd, et al.

Pursuant to Fifth Circuit Local Rule 28.2.1, as modified by Local Rule 29.2, the Ortiz Appellants hereby certify that the following listed persons constitute the *Amici Curiae* interest:

Amici Curiae:

Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood and Henry Evers

Trial and Appellate Counsel for *Amici Curiae*:

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Appendix A

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Appendix A

STATEMENT OF THE INTEREST OF *AMICI CURIAE*

Amici curiae Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers are all members of the defendant health claimant class in *Continental Casualty Co. v. Rudd*, in addition to being members of the plaintiff class in *Ahearn v. Fibreboard Corp*. These class members did not participate in the district court proceedings in the *Rudd* case, but they intervened in *Ahearn* for purposes of objecting to the proposed plaintiff class settlement releasing class members' present and future personal injury claims against Fibreboard. *Amici* appealed from the district court's judgment in *Ahearn*, and their initial brief in that case ("Brief of the Ortiz Appellants") is now on file with this Court.

Despite their strenuous objections to Ahearn, *amici* fully support the *Rudd* judgment, which neither extinguishes nor impairs asbestos victims' claims against Fibreboard, but instead merely resolves a declaratory judgment action by Fibreboard's insurers against two defendant classes of individuals with a colorable basis for objecting to the reasonableness of the policies' settlement. The agreement between Fibreboard and its insurers is highly beneficial for asbestos victims because it eliminates the risk that billions in insurance proceeds will be lost in the event that Fibreboard does not prevail in the Coverage Case.

STATEMENT OF THE CASE RELEVANT TO *AMICI CURIAE* ARGUMENT

This case, *Continental Casualty Co. v. Rudd*, relates to an October 12, 1993, settlement agreement (the "Trilateral Agreement") among Fibreboard Corporation and certain of its insurers, Continental Casualty Company, CNA Casualty Company, and Pacific Indemnity Company (the "insurers"). The Trilateral Agreement confirms the insurers' coverage of tort liability arising from Fibreboard's manufacture of asbestos and provides for an approximately 3.5 billion dollar liquidation of

Appendix A

the policies.[1] The agreement eliminates the risk that the insurers will be absolved of liability in a California state case, *In re Asbestos Insurance Coverage Cases*, Judicial Council Coordination Proceeding No. 1072 (the "Coverage Case"), now stayed pending resolution of this case. By its terms, the Trilateral Agreement requires court approval, in a "Settlement Agreement Approval Judgment," of the settlement of the Coverage Case. This judgment was obtained in *Rudd*.

In contrast to the class settlement at issue in *Ahearn*, the *Rudd* judgment has no effect on asbestos victims' tort remedies, "except to the extent that potential rights of direct action against the Insurers will be abrogated by [the Settlement Agreement Approval Judgment]." (*Rudd* FOF:70¶113).[2] *Rudd* is an adjudication of "whether the Insurers and Fibreboard may settle — without the consent of any other individual or entity — legitimate insurance coverage disputes by paying fair value, in a way that terminates all rights that might be asserted by strangers to the disputed policies[.]" (*Rudd* FOF:63¶103). "The principal legal question presented by the case is whether, and under what circumstances, an insurer and an insured (here, the Insurers and Fibreboard) may settle their insurance policy." (*Rudd* COL:21¶43(a)). The two classes subject to the *Rudd* declaratory action are individuals with a colorable stake in Fibreboard's insurance coverage.

Although the Trilateral Agreement contemplates that judgments could be entered in both *Ahearn* and *Rudd*, the agreement also anticipates that only the *Rudd* judgment may be

1. Under the agreement, 2 billion will be paid to Fibreboard to defend and indemnify post-August 27, 1993 claims. Additionally, all previously pending cases will be defended and paid by the insurers (JA76:9-15).

2. Citations to "*Rudd* FOF" reference the district court's Findings of Facts entered in *Rudd*. See Flanagan RE13. Citations to "*Rudd* COL" reference the district court's Conclusions of Law entered in *Rudd*. *See* Flanagan RE5.

legally feasible (JA76:4, 10-15; *Rudd* FOF:47¶80,53¶91). *Rudd* therefore effects a stand-alone, back up agreement regarding Fibreboard's insurance coverage independent of the plaintiff class settlement of personal injury claims instituted in *Ahearn* (*Rudd* FOF:47-8,¶¶81-2). Fibreboard and the insurers intend that the Settlement Agreement Approval Judgment in *Rudd* be effective notwithstanding the lack of viability of the Global Settlement Agreement entered in *Ahearn*:

> Whether or not the Global Settlement Agreement is executed or obtains the final necessary court approvals to become effective, upon entry of Settlement Agreement Approval Judgment the parties desire and intend by this [Trilateral] Settlement Agreement to fully and finally compromise all claims under the Insurance Policies not previously released, including any and all claims asserted in the Coverage Case.

(JA76:4¶O). The agreement details the procedure to be followed if the Settlement Agreement Approval Judgment succeeds but the Global Settlement fails: approximately two billion dollars will be paid to Fibreboard for its use in paying unliquidated tort claimants, who will still retain the right to bring tort actions against Fibreboard (JA76:10-15 §2.3, 18 §3.3). This outcome provides the appropriate resolution of this entire appeal.

This *Amici Curiae Brief* urges affirmance of *Rudd* despite the fact that the Ortiz Appellants' Brief in *Ahearn* argues for reversal of that case. The only asbestos claimants opposing *Rudd* are the Flanagan Appellants, who "did not present any credible evidence that the Trilateral Settlement Agreement is an inadequate or insufficient settlement, and did not offer a cogent reason why the [district court] should decline to enter such judgment." (*Rudd* FOF:70-71¶114; *see also Rudd* FOF:56).

SUMMARY OF THE ARGUMENT

Rudd does not present the same case and controversy issue that undermines the judgment in *Ahearn*, as the *Rudd* classes were not represented by class counsel in *Ahearn*, the *Rudd* dispute between the insurers and the class of potential asbestos victims was not settled *ab initio*, and the relief prayed for in the *Rudd* complaint was not feigned. Because *Rudd* is predominantly equitable and is certifiable under subsections (b)(1) or (b)(2) of Rule 23, *Rudd* also is distinguishable from *Ahearn*, which, if certifiable for class treatment at all, is properly certifiable only as a Rule 23(b)(3) class. Here, unlike in *Ahearn*, Rule 23(a)'s commonality and typicality requirements are met because the claims to be adjudicated in *Rudd*, the defendant class members' colorable challenges to the reasonableness of the insurers' settlement with Fibreboard, raise issues that are identical for each class member. Whereas the district court in *Ahearn* relied completely on the terms of settlement to create the requisite commonality and typicality, here the reasonableness and propriety of the Trilateral Agreement is the central issue to be litigated in the Insurers' declaratory judgment action.

ARGUMENT

I. THE TWO BILLION DOLLAR LIQUIDATION OF FIBREBOARD'S POLICIES WITH THE INSURERS BENEFITS ASBESTOS VICTIMS.

If *Ahearn* is reversed and *Rudd* is affirmed, then $1.525 billion plus interest from the insurers, and an additional $475 million, less certain deductions, will be made available to Fibreboard to pay costs and claims arising from asbestos injuries (*Rudd* FOF:53-54¶91; JA76:10-15§2.3, 18 §3.3). However, for these substantial funds to be available to Fibreboard, and thus indirectly to future asbestos victims, the judgment in *Rudd* must be affirmed here (*Rudd* FOF:55¶93 (explaining Trilateral)). Fibreboard's counsel testified that the settlement quantum likely

will cover the entire cost of Fibreboard's future asbestos claims, and Fibreboard has publicly attested to the fairness of the *Rudd* settlement (*Rudd* FOF:66¶107; JA7:436-37, 621-22, 2667-74). The district court correctly determined that no third parties' rights were abrogated by the Settlement Agreement Approval Judgment. While certain states' laws impose a duty upon insurers and insureds to negotiate fairly with each other, no state or territory grants claimants a "veto" power to prevent an insured from liquidating the policy in a reasonable, arm's-length settlement (*Rudd* COL:22-23¶43).

Fibreboard and the insurers fought for nearly two decades before resolving their coverage dispute (*Rudd* FOF:55¶93). The insurers were unwilling to pay more than the amounts ultimately achieved under the Trilateral Agreement (*Rudd* FOF:65¶106; JA7:1445, 1461-62, 1470-79, 1542). If the Trilateral Agreement is not ultimately approved, future asbestos victims face a risk that Fibreboard may lose the Coverage Case, rendering tort judgments against the company uncollectible (*Rudd* FOF:55¶93). The district court found that "the consequence of non-recovery presented to the classes if the significant risk posed by the Coverage Case materializes is so dire as to be unacceptable if a reasonable alternative is available." (*Rudd* FOF:64¶105). Even the California Supreme Court's favorable adjudication of the Coverage Case does not assure immediate termination of the litigation, as issues unique to the parties are still pending in the Court of Appeal (*Rudd* FOF:61¶100). Thus, even under the best of scenarios, the claimants face years of uncertainty absent settlement. *Id.*

With the exception of counsel for the Flanagan Appellants, the overwhelming consensus of all informed counsel is that the insurance settlement is in the best interest of asbestos victims (see *Rudd* FOF:56¶93). The representatives of the defendant class of asbestos-exposed individuals were gravely concerned that the California Supreme Court will eviscerate Fibreboard's insurance coverage by adversely deciding the Coverage Case. *Id.* Professor

Eric D. Green, the Guardian Ad Litem in *Ahearn*, opines that the risks of "roll[ing] the dice" in the Coverage Case are too significant for future asbestos victims to take this chance (*Rudd* FOF:56-57¶93). Counsel for the *Ahearn* class of future asbestos victims similarly believe that the benefits of the policies' settlement outweigh the risk of future litigation in the Coverage Case (*Rudd* FOF:56¶93).

After massive international notice, only one member of the asbestos claimants' bar and a minuscule number of asbestos-exposed individuals objected to the *Rudd* settlement. The *Rudd* detractors presented "no substantial evidence of economic inadequacy or practical detriment" caused by court approval (*Rudd* FOF:67-68¶¶108-09). Even a client of Mr. Jaques, counsel for the lone Flanagan objectors to *Rudd*, supports the settlement (*Rudd* FOF:68¶110; JA7:3021-25). Although defining themselves as a maritime class, the Flanagan Appellants also stand in opposition to the American Merchants Marine Veterans, a national organization that supports the *Rudd* settlement. *Id.*

In addition to its independent assessment that the Trilateral Agreement was fair, reasonable, and arm's-length, thus justifying the requested declaratory relief, the district court held that the class representatives' consent was valid. The court-appointed counsel for the *Rudd* defendant class of asbestos victims consented to the entry of the Settlement Agreement Approval Judgment at trial. Consent was "fully independent[,]" and made "only after careful consideration of the circumstances, based upon [the representatives'] independent determination that this furthered the best interests of the respective classes." (*Rudd* FOF:60-61¶99). The "unusually complete information" illuminating the benefits of the settlement include full discovery and trial in the district court; exhaustive discovery, trial, and appellate briefing in the Coverage Case; and decades of underlying asbestos personal injury litigation (*Rudd* FOF:61-62¶101; JA7:650-53, 1129-36).

By affirming *Rudd* and reversing *Ahearn*, this Court can maintain the institutional integrity of the federal courts which is threatened by the proposed quasi-legislative tort reform program that is the subject of *Ahearn*, and simultaneously ensure that future victims will have access to proceeds from Fibreboard's contested insurance coverage. *Ahearn* and *Rudd* "create very different procedures for handling" the insurance proceeds (*Rudd* FOF:52¶89). *Rudd* does not affect tort claimants' ability to sue Fibreboard in the future as their claims become ripe. Without the waivers and restrictions of the Global Settlement Agreement in *Ahearn*, the injured claimants will be able to sue Fibreboard and to include their lawful claims for punitive damages, joint and several liability, and pre- and post-judgment interest.

II. A CASE AND CONTROVERSY EXISTS IN *RUDD*.

A. *Rudd* Class Counsel Litigated Their Clients' Claims.

The procedural history of *Rudd* significantly differs from *Ahearn* on the issue of whether a live controversy supports justiciability. The two defendant classes certified in *Rudd* are a Health Claimant Class of parties exposed to asbestos who had yet to bring a claim against Fibreboard, and a Third-Party Claimant Class of those with potential liability related to these exposed parties' claims, as, for example, other manufacturers of asbestos-containing products that could be co-defendants with Fibreboard (*see Rudd* FOF:3). Although the definitions of the *Ahearn* plaintiff class and *Rudd* defendant health claimant class coincide, the *Ahearn* plaintiff class counsel, which was hand-picked by Fibreboard, did not represent the defendant class of asbestos-exposed individuals in *Rudd*. The *Rudd* Health Claimant Class counsel was appointed independently by the district court after the case was filed (*Rudd* FOF:8¶8). Rather than agreeing to the case prior to its commencement, as occurred in *Ahearn*, counsel for the Health Claimant Class and Third-Party Claimant Class in *Rudd* answered the complaint, denying the insurers' right to a declaratory judgment and raising numerous affirmative

defenses to the action (*Rudd* FOF:9-10¶¶11-12). *Rudd* defendants' class counsel participated in discovery as adversaries to the insurers (see *Rudd* COL:10¶21; *Rudd* FOF:11¶13). It was not until after trial that class counsel consented to the terms of the Trilateral Agreement (*Rudd* FOF:13¶17, 14¶19), and they did so only after negotiating an amendment to the terms of the Trilateral Agreement to provide for a "Special Reserve Agreement" setting aside $50 million to enhance the prospect that claimants in later years will have access to funds (*Rudd* FOF:71¶115).

B. Whether the Settlement Is Reasonable Is an Issue Ripe for Adjudication.

The *Ahearn* settlement releases tort claims against Fibreboard for injuries that do not exist but might occur in the future. In contrast, *Rudd* resolves the propriety of an *existing* settlement among Fibreboard and its insurers. The *Rudd* claims are ripe for judicial review because the facts that give rise to the defendants' right to oppose the settlement have already transpired. " 'A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.' " *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting *New Orleans Public Service, Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987)). No further facts bear on whether the settlement among the insurers and Fibreboard was reasonable at the time it was reached or whether the manner of the policies' liquidation was fair.

Even if this Court considers unripe the claims of the Insurers with respect to defendant class members who currently have no asbestos-related disease, the class relief sought here is appropriate because many defendant class members, including *amici* Esteban Ortiz, John Allgood, and Henry Evers, already have asbestos-related injuries. With respect to such defendant health claimant class members who *do* have current asbestos-

related injuries, their interest in the liquidation of Fibreboard's insurance policies is unquestionably ripe for adjudication today. And, as noted by the Rules Advisory Committee with respect to Rule 23(b)(2), "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Rules Advisory Committee Note to Subdivision 23(b)(2). Because the Insurers' claim regarding the propriety of the Trilateral Settlement is, at the very least, ripe with respect to defendant class members who now suffer from a current asbestos-related disease, their request for declaratory relief with respect to the entire class is permissible. Here, "the adjudication of the issue as to one class member must be an adjudication as to all[,]" (*Rudd* COL:16¶35), and the relief with respect to currently ill defendant class members therefore has general application to class members who have not yet developed any asbestos-related condition.

III. THE *RUDD* CLASSES RECEIVED DUE PROCESS.

The constitutional limitations on employment of the class action device articulated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), are not violated in *Rudd*.[3] In *Shutts*, the Court took great care to note that the due process requirement of a right to opt-out does not apply to equitable claims: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments." 472 U.S. at 812 n.3. Here, the insurers' request for declaratory and injunctive relief falls outside the bounds of *Shutts*, in sharp contrast to the money damages claims at issue in *Ahearn*. The monetary consideration in *Rudd* does not change hands between the plaintiff insurers and the defendant classes;

3. The Ortiz Appellants contend that *Shutts* is violated in *Ahearn* (*compare* Ortiz Appellants' br., 26-34).

rather, the effect of the Settlement Agreement Approval Judgment is merely court approval of the policies' liquidation. Furthermore, *Rudd* does not implicate the same fundamental fairness concerns regarding individual control that necessitate an opt-out right in *Ahearn*.

Unlike class members in *Ahearn*, the members of the health claimant class in *Rudd* currently possess sufficient information to determine whether to challenge the settlement, and they are each identically situated for purposes of assessing that information. The facts shaping the substantive claim in *Rudd* — whether the settlement was fair — have already been fully developed. This sharply contrasts with the *Ahearn* class claims released in that settlement, which are based on injuries and factual circumstances that have not yet occurred and will be individual to each claimant.

The district court's approval of the policies' liquidation in *Rudd* is more akin to the trust, common fund, and suit to quiet title cases relied upon by the district court in *Ahearn* and distinguished by the Ortiz Appellants (*see Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987); *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966); *Meyer v. Citizens and Southern Nat'l Bank*, 677 F. Supp. 1196 (M.D. Ga. 1988) (discussed in Ortiz Appellants' br., 50)). The tort claims extinguished in *Ahearn* are individual, depend on unique and future facts, and do not require present extinction on a global basis. By contrast, *Rudd* invokes the classes' collective, fungible interest in a single settlement agreement of the insurance coverage dispute and will make approximately $2 billion dollars available to Fibreboard for asbestos victims who may pursue their individual tort claims and due process rights.

The *Klugh* court, in permitting present resolution of futuristic claims, relied on a "remaindermen" theory, which requires that "one of the parties to the action is so closely aligned with the interests of the nonparty as to be his virtual

representative." 818 F.2d at 300. Any *Rudd* claimant qualifies as a virtual representative of the other with regard to challenging the arm's-length quality and fairness of the settlement. Regardless of how one was harmed by asbestos, whether Fibreboard and the insurers settled the policy for a reasonable quantum and in an arm's-length transaction are identical issues shared by all. Because one's individual injury from asbestos is unique, the *Ahearn* extinction of individual personal injury claims in global form is both unnecessary and impermissible. Whether a single tort claimant chooses to settle a claim with Fibreboard has no inherent interrelation to another victim's decision to settle. In *Rudd*, by contrast, the court's adjudication of the propriety of the settlement necessarily determines the rights of all people with any claims to the policies, as did the adjudications regarding common property in *Klugh*, *Hatch*, and *Meyer*.[4]

IV. RULE 23 IS NOT VIOLATED.

A class action must satisfy the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23. Because the issues of fairness and arm's-length character of the settlement negotiations and the reasonableness of the settlement amount are common to all class member claims, Rule 23(a) is satisfied. The Rule 23(b) requisite is met because *Rudd* is certifiable under either Rule 23(b)(1)(A) or 23(b)(2).[5]

4. Similar to *Klugh*, the holding in *Hatch* was derived from the "contingent remaindermen" theory. 361 F.2d at 566. *Hatch* and *Meyer* both assume that a guardian ad litem could be appointed to represent the interest of unborn children in a trust or real property without violating federal constitutional due process. *Id.*; *Meyer*, 677 F. Supp. at 1209.

5. The district court determined that Rule 23(b) was met in any one of three ways: under subdivision 23(b)(1)(A), 23(b)(1)(B), or 23(b)(2) (*Rudd* COL:13¶30). This Court need not address whether the Rule 23(b)(1)(B) "limited fund" provision applies, as two alternate theories for certification justify affirmance (*see Rudd* COL:17¶36 ("[I]t is not necessary for the Court to analyze the case in terms of the existence of a 'limited fund.' ")).

Unlike the *Ahearn* case, in which numerous individual issues regarding exposure, medical causation, and damages pervade and predominate each plaintiff class member's claim against Fibreboard, the Insurers' claims for declaratory relief in *Rudd* all reduce to issues regarding the fairness of the Trilateral Agreement and the non-collusiveness of its negotiation. Because those issues are identical with respect to all defendant class members, they satisfy Rule 23(a)'s requirements of commonality and typicality. As tort claims against Fibreboard are not directly at issue in this case, individual issues endemic to asbestos litigation pose no obstacles to certifying a class.

The requirements of Rule 23(b)(2) and (b)(1)(A) are met in *Rudd* because the district court proceeding was effectively an action by the Insurers to quiet legal title to a fixed asset — Fibreboard's insurance policies. Subdivisions (b)(2) and (b)(1)(A) were both designed to apply in situations in which the relief sought would necessarily determine the rights of all class members, regardless of their individual circumstances. *See* Rules Advisory Committee Note to Subdivision 23(b)(2) ("[t]his subdivision is intended to reach situations where . . . final relief of an injunctive nature or of a corresponding declaratory nature, settle[s] the legality of the behavior with respect to the class as a whole"); Rules Advisory Committee Note to Subdivision 23(b)(1)(A) (explaining that certification under subdivision (b)(1)(A) is appropriate to avoid incompatible adjudications with respect to rights and duties regarding particular property).

As potential third-party beneficiaries to that asset, all of the defendant health claimant class members have an interest in pursuing a legal claim to the settlement proceeds. The Insurers filed this action seeking a declaration that no such legal claim would be valid if made directly against the insurance policies, and that Fibreboard, as the insured, is the proper holder of title to the proceeds from the liquidated policies. The Insurers' right to such a declaration turns solely on the facts surrounding the

settlement they reached with Fibreboard, rather than on any individual circumstances of defendant class members. Thus, any adjudication of the Insurers' right to quiet title with respect to a single defendant class member necessarily determines the rights of all other class members, (*Rudd* COL:16¶35 ("the adjudication of the issue as to one class member must be an adjudication as to all")), and the district court's certification under Rule 23(b)(1)(A) or 23(b)(2) was therefore proper.

CONCLUSION

The *Rudd* judgment is in the best interest of Fibreboard's asbestos victims. Unlike the private adjudication system created by *Ahearn* to substitute for the state and federal courts, the *Rudd* judgment leaves individual class member claims against Fibreboard untouched and merely allows certain of Fibreboard's insurers to liquidate the policies by making substantial funds available to Fibreboard. The constitutional and procedural problems requiring reversal in *Ahearn* are not an obstacle to *Rudd*. The judgment in *Rudd* should be affirmed.

Respectfully submitted,

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APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

FREDERICK M. BARON STATEMENT

[Commencing at page 89]

* * *

Your Honor, let me also begin by clearing some brush. We think that the settlement that was reached between Continental Insurance, Pacific and Fibreboard is a superior settlement; we think it is something that ought to be approved very promptly by this court; and we think that that settlement will resolve all of the issues that otherwise would be before this court. That settlement known as the trilateral is a great settlement, as far as I'm concerned, I know of no one that opposes it. . . .

* * *

STEPHEN M. SNYDER TESTIMONY

[Commencing at page 171]

* * *

Q. All right. What did you do to come up with a new, better or improved SSP?

A. Couple of things. We had information from the people that we had talked to, it was pretty clear that they had a couple of problems. First of all, they wanted some cash before they would accept any kind of arrangement. And they weren't totally against the idea, but they were concerned that Fibreboard could not be trusted to conserve its [172] resources and that if they didn't pull its resources out of it right now it might run away and hide those resources at a later time. So they were concerned about that. And in many of our talks with people, we were told that the people that they referred to or consulted with on what to do

about their Fibreboard cases were the lawyers in California, principally the northern California lawyers Steve Kazan and Howard Wartnick. We went back with the thought if we could make the structured settlement program work with those two lawyers that the word would get out that this was a program that could be trusted and accepted.

So we met with them late in 1988. I think they investigated the coverage case, they did some basic work on Fibreboard's corporate resources, and we negotiated a structured settlement program in 1988 that had a 40 percent cash component in it for the pre-'59 cases that were covered by the Continental and Pacific policies if we won the cases. But we didn't have to pay any cash on the post-'59 cases, where our resources were thinnest. That was one component.

The other component was that in each structured settlement program deal that Fibreboard [173] signed, it made a promise to the claimant that it would not make any impermissible distributions, that's a term of — defined term in the agreement. That means it would not make dividend distributions of any kind above a certain limit, it would not do a leveraged buyout, it would not do any of those corporate reorganization type things that the plaintiffs were afraid that a company like Fibreboard would do in order to escape liabilities in the litigation. That was the structured settlement program that we negotiated with Harry Wartnick and Steve Kazan, and that was half of the program.

The other half of the program was we had to figure out how to pay the 40 percent, because 40 percent was — we didn't have that much money. Fibreboard had just over a hundred million dollars, and that was not going to be enough to finance this program. So we went to Continental and to Pacific and talked about a possible coverage settlement. It was clear we couldn't do a complete settlement, and it was clear with Pacific that they were not interested in an interim agreement. And so we entered

into an interim agreement with Continental Casualty in December of 1988.

* * *

[184] Q. . . . Did you attempt, in about this period of time, to work out a settlement with CNA and Pacific?

A. If about this time is late 1990, I believe we did.

Q. All right. And, briefly, what did you propose and what was the result?

A. It came out of negotiations to get the caps lifted on the defense costs and their agreement, [185] those being unsuccessful, Fibreboard proposed to Pacific Indemnity and Continental that we negotiate a complete policy buyout. That was discussed and Fibreboard made a proposal in late 1990 to accept a certain amount for complete release of all the coverage obligations under the policies.

THE COURT: Was the coverage case — what was its status at that point?

A. In January 1990, Your Honor, Judge Brown issued his judgment, and I think the —

THE COURT: Okay. This was post-judgment?

A. This was post-judgment.

THE COURT: But shortly after?

A. Very shortly after.

MR. MILLER:

Q. You were unable to reach an agreement with the two carriers?

A. That's right. We made a demand and it was rejected. I think Pacific was interested in doing a complete policy buyout, but Continental was not at that time. The demand was $750 million, I believe.

* * *

[231] * * *

Q. Turning your attention to early 1993, Mr. Snyder, what did you consider to be your bargaining position with respect to Continental at that point?

[232] A. Going back to the three things that we had on our minds in 1990, when we started the assignment program, in early '93 we had a new Pacific Indemnity deal which called for a 5.2 order but which could give us as much as $360 million, which I hoped would be enough for Mr. Inselbuch, if I got back to the bargaining table with him, for post-'59 cases. We needed a 5.2 order to ring the bell at that high number. And so we were in litigation against Continental in Texas in the Ness Motley deal in order to get that order.

The assignment program had been a very substantial success, and so we had over a billion two in settlements that we had done. But just as important, it looked as though we would be able to do as many of those settlements as we wanted in the future. And so that is something that we were aware of and I'm sure Continental was aware of. And those two things gave us great leverage and great credibility with Continental. We had enough money to pay for the post-'59 cases in a global negotiation, and we had a settlement vehicle that was very unfriendly to Continental that could keep us out of trouble in

the litigation and alive long enough to get to the coverage case result.

* * *

[303] * * *

Q. When you were negotiating with the Ness Motley [304] firm at that time, how big of a factor were they for Fibreboard? What percentage of the cases across the country did they control or were they involved in?

A. To one extent or another, it appeared they were involved in about 50 percent of all cases brought against Fibreboard across the country.

* * *

[309] * * *

Q. All right. So armed, as it were, with what you thought was an imminent assignment based on the global with the plaintiffs, you turned to the April 9 agreement. And I would like for you to tell us from your perspective what it is basically that Fibreboard got in that agreement and basically what it was that Continental gave.

A. We reached a compromise —

MR. MILLER: Wait a minute.

[Laughter]

MR. MILLER: I'm sorry. You had to give something up to get it, Mr. Snyder.

Q. Would you tell us what that was?

A. We had several meetings with Judge Higginbotham. We had several meetings in Dallas [310] where Judge Higginbotham was — his office is, Fifth Circuit, and I believe it was at the law firm Vinson & Elkins there. Those meetings went late into the evening, they were fractious, they were contentious, sometimes they were downright nasty. What was most difficult in my perception for Continental was making the commitment to get the global and have it include all the cases, particularly the language, the best-efforts language, which was I believe viewed by them, I know it was viewed by me as a standard that could be judged in the courts and by which they could be held.

* * *

[316] * * *

Q. Did you then make some effort to put together a bilateral, so-called, insurance settlement following that meeting?

A. A couple of things were going on at that time. We had available to us Judge Higginbotham's offices. We were still working with him in connection with the Ness Motley deal. He was still listening to us about global matters. And so on one front, I think we prevailed upon him to try to assist the parties in — in putting something back on the global front. And I think there was a certain amount of depression and despair on the Fibreboard/Continental side. So we did discuss the possibility of perhaps Continental buying out the Fibreboard policy and then Fibreboard would do what it could either to do its own global or simply go off on its own.

Q. And what happened to those discussions?

A. We had meetings in New York, we had a meeting in San Francisco. They were very unproductive meetings. In fact, you know, it was — it would have been better had the meetings never occurred for the ability of Fibreboard and Continental to work

together. And it was very clear that we weren't [317] going to be able to do that sort of deal.

* * *

[335] * * *

Q. How long did it take you to negotiate the terms of what became known as the trilateral settlement?

A. That took most of the day the next day, or most of the morning the next day. Fibreboard obviously wanted the global. The global was a triggering event under the April 9th agreement for Fibreboard to get all its cases covered. The demand of Fibreboard, however, from Continental was that it would pay no more for the trilateral than it was paying for the global.

Q. Period?

[336] A. Period. Fibreboard's point was that if — if the — if the trilateral was all it had, it would incur substantially higher defense costs in the tort system and that money would nowhere be equivalent to what it would be in the global.

We got nowhere with that. And we therefore basically ate the defense component in order to get the global done. And we accepted that term. And that's the term that was laid on the record the next day, that the trilateral that ultimately was worked out would have the same price as the global, and that's what we agreed to.

* * *

[379] * * *

A. The — major issue, the major difference between those two situations has to do with the amount of dispute and transactional

costs that will be in the system. In the trust situation, because of the way that the trust is designed, we're all hopeful that the expenses of administration and defense will be kept within the 10 to 15 percent range that we've relied on experts to advise us on. There is some evidence in other similar circumstances to suggest that that is a — is a reasonable estimate. And we're hopeful that we can stay within that range. We already know what happens in the tort system. In the tort system, we — well, also under the trust, obviously, the plaintiffs' counsel fees are limited to 25 percent. So we're talking about appreciable [380] extra value delivered to claimants in that system.

In the tort system, we know, and one of the purposes of my going through the Fibreboard defense costs yesterday is that it is not unusual to see the defense costs equal and be at the same level as the indemnity payments. In the years 1988, '89 and '90, when Fibreboard was defending claims to set values and was keeping the value in the 5,000 to $4500 range, where I think it belongs, Fibreboard was spending more money on defense than it was spending on indemnity.

* * *

[453] * * *

Q. Okay. If after the complaint was filed, you're [454] not able to come to terms with plaintiffs' counsel and Continental and Pacific on all of the specifics of the global settlement agreement, was there a provision — would there have been an understanding among the parties as to what would have happened in Ahearn?

A. I think my understanding — I can't speak for everybody, Mr. Baron, but my understanding was that if Fibreboard didn't nail down this global, that it was either going to get prosecuted in Linscomb or it was going to get prosecuted in some class action someplace.

* * *

[464] * * *

Q. Okay. Mr. Snyder, do you have an explanation for me as to why so many people filed claims against Fibreboard prior to the injunction in this case?

[Laughter]

A. I believe — well, I — you know, I'm astounded by that question.

[Laughter]

A. I believe that that is a testament to — to the [465] operation of the contingency fee system in this litigation.

MR. BARON:

Q. Well, are you saying that what was happening here is that lawyers realized that there might be a different deal that might not be as good for their clients and they wanted their clients to get in under the wire?

A. I'm saying it didn't have anything to do with their clients; it had to do with their own financial self-interest, that's what I'm saying.

Q. And what evidence do you have of that?

A. 15 years experience in this litigation and knowing the difference between people who care about their clients and people who don't.

* * *

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[517] * * *

Q. [By Mr. Baron] And that's what you interpreted his suggestion to broaden?

A. Yes.

Q. I see. Did you ever attempt to do that, by the way?

A. I talked to a lot of people all through this period during my settlement negotiations about whether we had enough people and the right people. I talked to you, too, about it. And I felt comfortable that we had the right group of people. For the most part, the lawyers in the east and in the Gulf States rely on Steve Kazan and Harry Wartnick about Fibreboard matters. And everybody, including you, told me I couldn't do a deal without Ness Motley.

* * *

[593] * * *

A. Fibreboard, on August the 27th, in order to get a global, went along with Continental's demands. Otherwise, no way would we have entered into that settlement.

Q. Were you forced into it?

A. I don't want to use the term "forced," but it was an awful big carrot.

Q. $2 billion is a pretty good size carrot.

A. No, that's not the carrot, Mr. Baron.

Q. What's the carrot, Mr. Snyder?

A. It was the global settlement agreement that we could not

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have, plaintiffs said, unless we also entered into a bilateral with Continental, and Continental said we couldn't have unless we priced it on the identical terms as the global, which was not in a bilateral negotiating settlement acceptable to [594] us.

Q. So the thing that forced you into the bilateral or trilateral, as it's called, was the plaintiffs working out this arrangement for global?

A. Was the existence of the agreement in principle that was put on the record on the 27th, whereby we had a reasonable prospect of doing a global if the parties, Continental and Fibreboard, would agree on a trilateral. And that agreement was important enough to Fibreboard to make it give on some important points in the trilateral.

* * *

TESTIMONY OF HARRY WARTNICK

[Commencing at page 643]

* * *

You also have heard testimony from Mr. Snyder, have you not, on the subject of Fibreboard's litigation with its carriers?

A. Yes, I have.

Q. Did you follow that litigation?

A. Yes, I did.

Q. And were you aware of the status of that litigation as we approached the year 1991?

A. I've been generally aware of it since the mid-1980s. I actually

attempted to intervene a plaintiff into that litigation back in 1983-1984, sometime in that general time period, and I have followed it generally ever since.

Q. How did you follow it, sir?

A. I was in San Francisco, I paid attention to what was going on at the courthouse. When the various tentative decisions came down from Judge Brown, I obtained copies of it. We obtained copies of the judgment. And when the case went up on [644] appeal, we obtained copies of the various briefs and generally made an effort to keep abreast of what was occurring.

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TESTIMONY OF STEVEN KAZAN

[Commencing at page 903]

* * *

Q. And if I were to ask you the same question about the time course of the Fibreboard insurance litigation, did you follow that as well?

A. I also followed it. I'm not sure I followed it quite as well as Mr. Wartnick did. But, yes, I was aware of it, read the opinions, read the briefs, kept current on what was going on, talked to people at Brobeck about it and so on.

* * *

[911] * * *

Q. Do you have a view that you can offer to the court about whether or not you think the Ahearn settlement is fair?

A. Certainly I do have a view.

Q. Please tell the court.

A. I think it's a very fair settlement, certainly for the members of the Ahearn class.

Q. Why is that, sir?

A. Because in the context that we were dealing with from the start in 1991 and up through the time that the agreement was reached in 1993, just focusing on that period, there was very grave risk involved for members of this class. Fibreboard was a small company that was very important in certain areas of the country and, as Mr. Snyder explained, through the ACF, became increasingly prominent in other areas of the country. It was a company that was effectively swamped by its asbestos exposure. The best illustration of that is this is a company that had around 4 million shares of common stock and at a relevant period it was trading at two, three, four [912] dollars a share. The market was valuing this company at 10 or 15 million dollars when it had assets, as we've heard here, that place it in the 200, 250 million-dollar range, net of asbestos exposure. It had run through most of its insurance coverage, it had left its insurance claims in the California courts and if it lost is coverage, it was all over. If it won its coverage, in my view, it was still all over, but it would have been a slower and more painful death. The risk involved with the insurance coverage litigation was, in my view, very substantial. I don't know that I could have articulated it with quite the elegance of Justice Kaufman, you know, but he was one of the guys at the time who was on the court, and we knew that there was a good result in the trial court, we were optimistic about the intermediate appellate court, although clearly there was substantial risk there, and frankly although we tried not to show it we were scared to death about the California Supreme Court. So there was a very great risk, as we saw it — as I saw it. . . .

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TESTIMONY OF MEYER G. KOPLOW

[Commencing at page 1325]

* * *

Q. Now, would you — at the time when our firm was called in on this in February, when you started to become involved, just to — we've heard Mr. Snyder's testimony as to what he was trying to do, and I'm going to essentially ask you whether the reciprocal was — what the situation was facing Continental. Is it correct that you had had this massive assignment program where tens of thousands of cases had been reported to be settled by Fibreboard essentially using Continental's money and without Continental's consent?

A. Yes, there was such a massive assignment program.

Q. And is it correct that based on what we were advised by those who had been long involved in the situation that the values on these settlements had been very much escalating?

A. Yes, that's correct.

* * *

[1326] * * *

Q. Is it correct that the judicial decisions which had been rendered were not going particularly well for Continental, that Continental had lost its punitive damage case in the Ninth Circuit, Continental had lost the Andres assignment case on the right to assign in the trial court in California?

A. That's also correct.

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Q. Now, we did understand that that was not a res judicata procedure, is that correct, in the California procedure?

A. That's right.

Q. And was it also the case that Continental had attempted to take a writ of mandate and get an immediate review of that Andres decision from the California court of appeal and had failed in that attempt?

A. I believe that's what I was advised at the time.

[1327] Q. And as has been testified by all the witnesses, Continental was then faced with the lawsuit brought against it by Fibreboard in this court, by Fibreboard with the plaintiffs allied with Fibreboard who were representing to the court in substance that they had been successful in achieving a settlement of tens of thousands of asbestos cases and that all that was needed to finalize that settlement was for the court to agree with the Andres court that such assignments were indeed valid, that the amounts were reasonable and that it was appropriate to put — to issue a bar order of contribution against Pacific? Is that correct?

A. I believe it to be correct. It was about 20,000 cases at the time.

Q. With the provision for more being added?

A. Well, more were added over time.

Q. And this, as you understood, was a court which had considerable familiarity with asbestos cases and in Cimino had seen values far higher than the values that were in the Ness Motley 1 agreement; is that correct?

A. That was my understanding.

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* * *

[1328] * * *

Q. Now, did we then learn or did Continental then learn — I'm not limiting my question to the law firm — was Continental then apprised that [1329] Fibreboard was proposing to enter into a multi-billion-dollar global by way of assignment of all of its cases, class action, presents, futures with the plaintiffs?

A. Yes.

Q. And assuming that the assignments were valid, assuming there was a loss of the coverage case, then were that to happen Continental would have been forced to write checks for billions of dollars under an agreement as to which it had had no say on the terms and was facing the prospect of not being able to get even contribution from Pacific in that situation; is that correct?

* * *

[1376] * * *

Q. And was there then exploration and discussion between Continental and Fibreboard as to the possible [1377] negotiation of a bilateral agreement?

A. Yes, there was.

Q. Would you recount it?

A. We held several meetings with the Fibreboard representatives during the month of June 1993 that were for the purpose of seeing whether we could reach a bilateral agreement that did not include the plaintiffs. There were meetings in New York, there were some limited discussions in Washington, and you may recall that on June 30th, you and I attended a meeting at

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the Brobeck offices in San Francisco with a number of members of the Brobeck firm and with Michael Douglas, the general counsel of Fibreboard, in an effort to see whether we could reach agreement on a bilateral.

Q. What were the outcome of those discussions?

A. If I might, I'd like to — I'd just like to interject something to pick up a thread that was left hanging from something I said earlier.

Q. Sure.

A. Part of the — part of the thought in starting to discuss a bilateral was the hope that we could get the plaintiffs interested in something back to the table on a global. When that was reported to the plaintiffs, their attitude was basically, "That's [1378] fine with us; go ahead and reach a deal with Fibreboard. That would be perfectly okay."

We had a very difficult meeting on June 30th. There had been a lot of difficult meetings in this matter, but this one would rank right up there as a candidate for the most difficult meeting that we had. We were not close on price, we were not close on any other terms. It became very clear to us during the course of that meeting that it was going to be nigh onto impossible to reach a bilateral deal with Fibreboard. We had the Pacific Indemnity problem; that is, that we weren't prepared to lay out billions of dollars without an acceptable level of contribution from Pacific. The Fibreboard appreciation of a bilateral was that if they could not turn around and use the money to achieve a — a settlement, a global settlement with the plaintiffs, they would be left with the obligation of providing their own defense from — from these funds, and they told us that that was going to be a very significant cost. And I got the very definite impression that the Fibreboard side was not in agreement as among themselves as to whether or not a bilateral agreement was something that

was in the best interests of Fibreboard, and came away with the conclusion not [1379] only that it would be a long time before we could put some of the people who had been in the room back in a room together again given — given what had taken place that day, but also that there were people on the Fibreboard side who simply would — would never agree to — to the kinds of numbers that Continental might consider paying on a bilateral.

Q. . . . Do you have a view as to whether there was ever a prospect of successfully negotiating an independent bilateral or trilateral agreement with Fibreboard at a price — well, at the price which is in the trilateral agreement?

A. I don't believe that we could have — that we could have achieved that. We had extraordinary difficulty getting to a trilateral agreement, first in concept after the price parameters we thought had already been set, and then we had tremendous difficulty in getting from an agreement that had been [1380] achieved in principle in New Orleans on September 9th to a documented agreement which didn't get completed until more than a month after that. So I — my own personal view is that but for the plaintiffs having imposed this condition upon us as something that we would be required to achieve before they would ever agree to document a global and work out the rest of the terms and conditions beyond the price term that would be necessary was that there was no chance of achieving a separate bilateral or trilateral agreement with — with Fibreboard.

* * *

[1398] A. What was going on in the first 10 days of July was, as I mentioned, we had gotten close on Ness Motley, close on the price, close on the cash component, and although there were still other terms of the agreement to be worked out, those were the places we had to start. Judge Higginbotham was putting pressure on to try to get to some agreement between Continental and Pacific. And as I said, we had — we had had a horrible

meeting on June 30th about a bilateral. We were due to meet with Judge Higginbotham and the Fibreboard folks and Ness Motley I believe around July 13th. And just before that meeting, we received a letter from Fibreboard that appeared to us to be setting Continental up for a bad-faith claim in the event that global negotiations were unsuccessful.

Q. This is the July 9, 1993 letter?

A. That's the July 9, 1993 letter.

* * *

[1504] * * *

A. . . . At the same time — at the same time, there were other problems that presented themselves that we hadn't anticipated on August 26th when we struck this deal. One of the problems that the court [1505] and counsel would be familiar with is the fact that some 4,000 Baron & Budd claims got filed on August 27th with the claim that they were present claims, not futures. . . .